ings prior to the receivership, and a more accurate one subsequently; and the defendant company was directed to pay to the plaintiff the amount of the net earnings so estimated for a period of twelve years, or from the date of the defendant's first possession until the decree, amounting to several hundred thousand dollars. It was considered by the court that the defendant company could not equitably object to such an approximation, since it was its own fault that a more accurate estimate could not be made; and in estimating the net earnings, the court did not allow the amount invested in permanent improvements to be included in the amount to be deducted as expenses from the gross earnings. See, also, *Pennock* v. *Coe*, 23 How. (U. S.) 117; 2 Redf. Am. Railw. Cas. 667.

G. W. FIELD.

RECENT AMERICAN DECISIONS.

Supreme Court of Ohio.

ADAMS *v.* YOUNG.

Where fire is negligently thrown from a mill smoke-stack, and carried to a building outside the mill property, and thence to another building of a third party, and thence to other property that is damaged by the fire, whether such negligence is the proximate cause of such damage is a question of fact for the determination of the jury under the instructions of the court.

In an action against a mill-owner for damages to property caused by fire negligently or carelessly thrown by sparks from the smoke-stack of the mill, and carried to the property by a gale of wind blowing at the time in the direction of the property, by which fire the same was damaged, where the conditions continue the same as when the negligent and careless act was done, and no new cause intervenes, it is no defence that the fire first burned an intervening building, and was thence communicated by sparks and cinders, in the same manner to the building in which such fire consumed the property, though the buildings were separated by a space of two hundred feet.

ERROR to the District Court of Mercer county.

Isaac W. Young brought suit before a justice of the peace for $299.97, for household and kitchen furniture, destroyed by the burning of his family residence, in the town of Macedon, in Mercer county. On appeal, Young averred in his petition that Adams owned and controlled a steam-engine, boiler and fixtures, and a machine for dressing staves, and propelled by steam; that the engine, boiler and fixtures were placed within one hundred feet of a frame stable in the town, and within three hundred feet of his

dwelling-house; and that the smoke-stack attached to the boiler was defective and unsafe in this, that the screen upon the smoke-stack was coarse, and furnished no protection against sparks, and was in other respects defective, and the defendant well knew the same: and that on the 2d day of May 1878, the wind was blowing heavily from a south-westerly to a north-easterly direction, and in the direction of the stable and the dwelling; and one George Watson, who was the employee and agent of defendant, and who was managing the machinery, did, on said 2d day of May 1878, fire up and start the machinery, and so negligently, carelessly, and improperly run and operate the same, by reason of the defective and insufficient screen aforesaid, and careless and negligent conduct and management of the machinery, *and under the gale of wind aforesaid*, and the proximity of the machinery to the stable and dwelling aforesaid, that the sparks from the smoke-stack set fire to the stable and dwelling-house so occupied by plaintiff. Plaintiff therefore avers that by carelessness, negligence and improper conduct and management of the machinery, boiler, smoke-stack, &c., *and under the gale of wind aforesaid*, by the agent and employee of defendant, the defendant did set fire to, and burn up and destroy the goods and chattels, &c., the property of plaintiff.

To the petition, Adams answered as follows: (1) That he admits that the plaintiff was, at the time the same was consumed by fire, the owner of the personal property, as averred in the amended petition, and that the defendant further admits that, at the time, he was the general owner of the engine, boiler, smoke-stack and machinery described in the amended petition; but the defendant, in further answer to the amended petition, says that he denies each and every averment therein contained, not hereinbefore admitted. (2) And the defendant, for a second cause of defence, and for a further answer to the amended petition, says that the stable described in the amended petition was, at the time of the happening of the pretended grievances complained of, situated one hundred feet or more in a north-easterly direction from the engine, smoke-stack and machinery described in the amended petition, and that the dwelling-house of one James S. Crawford, was then situated two hundred feet or more in a north-easterly direction from the stable; that the house of Crawford then contained large quantities of gunpowder, coal-oil and other explosive and highly combustible substances; and that the property of plaintiff was situated in a frame building sixty feet

or more north of the house of Crawford. And the defendant avers that the fire which burnt and consumed the said property of plaintiff was communicated to said house of Crawford, by sparks and cinders from said stable, and from said house of Crawford to said house in which plaintiff's said property was situated, and from said last-named house to said property of plaintiff, and that in no other manner was said personal property set on fire and destroyed or injured. The said defendant, therefore, prays that he may go hence without delay, and with his costs.

To the second defence Young demurred, because the same did not state facts sufficient to constitute a defence. This demurrer was sustained, and the cause was tried upon the petition and first defence. The jury found that Young ought to recover of Adams. A motion for a new trial was overruled, and a judgment for Young was entered.

On proceedings in error, the District Court affirmed the judgment, and plaintiff in error now seeks to reverse these judgments.

The opinion of the court was delivered by

FOLLETT, J.—Was the negligence of Adams the *proximate cause* of the loss sustained by Young? The law does not regard an injury from a *remote cause.* There is no dispute as to the legal proposition; the difficulty is as to its proper application to the particular case. The sustaining the demurrer to the second defence is the only complaint of the plaintiff in error. There is no complaint of the trial on the first defence, in which the jury found against the plaintiff in error, and in which the jury must have found that his negligence was the proximate cause of the loss of the goods.

Does the second defence show, as a matter of law, a bar to Young's recovery? This defence is that *the fire* which burnt and consumed the property, was communicated to the house of Crawford by sparks and cinders from the stable, and from the house of Crawford to the house where the property was situated, and then to the property. It is not claimed that this fire was not the *same fire* communicated to the stable, by sparks from the smoke-stack, when Adams's agent negligently and carelessly fired up and started the machinery. So, from the petition and answer, it is shown that the fire started by Adams, is *the fire* that consumed the goods. Adams does not aver or claim there was any new agency or cause at any point of the line of this fire, and does not aver or claim that the

"gale of wind" increased in force or changed in direction. The stable and the houses were not *causes* of communicating the fire, but they were only *conditions* of the communication, existing when the fire was started. Strictly, the law knows no cause but a responsible will: and, when such a will negligently sets in motion a natural force that acts upon and with surrounding conditions, the law regards such human actor as the cause of resulting injury. "As a legal proposition, we may consider it established that the fact that the plaintiff's injury is preceded by several independent conditions, each one of which is an essential antecedent of the injury, does not relieve the person by whose negligence one of these antecedents has been produced, from liability for such injury." Whart. Neg., sect. 85.

Adams does not aver his ignorance of the surrounding conditions, or that there was anything unusual about them, or any change as to them. The objection as to *distance* through the air is disposed of by the averments of the answer, that the fire was thus communicated; the surrounding conditions being as they were, and no other cause being shown. There is no averment that this loss is not a probable and ordinary result of the negligence of the plaintiff in error; and this principle is an important test, if it is not the only test. Whart. Neg., sect. 150.

Ryan v. *N. Y. Cent. Rd. Co.*, 35 N. Y. 210, and *Pennsylvania Rd. Co.* v. *Kerr*, 62 Penn. St. 353, have been referred to as decisive here. The courts rendering those decisions have sufficiently "distinguished and explained" them.

In case of *Webb* v. *Rome, W. & O. Rd. Co.*, 49 N. Y. 420, FOLGER, J., on page 427, says: "I do not understand * * * that the decisions in 35 N. Y. and 62 Penn. St., *supra*, put forth any new rule of law, or one which has not been acted upon and recognised *pari passu*, with the recognition and growth of the principles upon which most of the cases above cited, are based. In *Ryan's Case*, the opinion of the court was, that the action could not be sustained, for the reason that the damage incurred by the plaintiff was not the immediate, but the remote result of the negligence of the defendant."

He then says: "*Kerr's Case* is the same in material facts, principle and reasoning." And he then says, (page 428): "I am of opinion that, in the disposition of the case before us, we are not to be controlled by the authority of the case in 35 N. Y., more than

we are by that of the long line of cases which precede it." And the court there held: "He who, by his negligence or misconduct, creates or suffers a fire upon his own premises, which, burning his own property, spreads thence to the immediately adjacent premises, and destroys the property of another, is liable to the latter for the damages sustained by him." And, on the facts there, also held: "In an action for the damages, the questions as to whether defendant was negligent in the use of its property, and as to whether the injury was the probable consequence of the negligent acts and omissions, were properly submitted to the jury."

In *Pennsylvania Rd. Co.* v. *Hope*, 80 Penn. St. 373, Chief Justice AGNEW says, on page 379: "But let us examine the case of *Rd. Co.* v. *Kerr*, and it will be found to be free from much of the criticism expended upon it." "It was not held in *Rd.* v. *Kerr* that when a second building is fired from the first, set on fire through negligence, it is a mere conclusion of law that the railroad company is not answerable to the owner of the second; or that if a fire is communicated from the locomotive to the field of A., and spreads through his field to the adjoining field of B., A. may be reimbursed by the company, while B. must set down his loss to a remote cause, and suffer in silence." Thus answering *Fent* v. *Toledo, P. & W. Ry. Co.*, 59 Ill. 362 and 358, *infra*. And in that case the court held: "Sparks from defendants' engine fired a railroad tie, from which rubbish, left by the defendants on their road, was fired, communicated with plaintiff's fence next to the road, and spread over two fields, burned another fence and standing timber six hundred feet distant from the road. *Held*, that the proximity of the cause was for the jury." "In such case the jury must determine whether the facts constitute a continuous succession of events so linked as to be a natural whole, or whether the chain is so broken as to become independent, and the final result cannot be said to be the natural and probable consequence of the negligence of defendants." In the opinion, the chief justice says (p. 378): "In determining this relation, it is obvious we are not to be governed by abstractions which in theory only cut off the succession. Abstractly each blade of grass or stock of grain is distinct from every other; so one field may be separated from another by an ideal boundary, or a different ownership, or it may be by a real but combustible division line." "It is at this point the province of the jury takes up the successive facts, and ascertains whether they are naturally and probably related

to each other by a continuous sequence, or are broken off or separated by a *new* and *independent cause.*"

Some states, as Massachusetts and New Hampshire, have provided by statutes that railroad companies shall be liable for damage caused by fire communicated by its locomotive engines. And in *Perley* v. *Eastern Rd. Co.*, 98 Mass. 414, damage was recovered for injury to property situated half a mile distant from the railroad.

In the state of Kansas damage has been recovered for injury to property situated many miles distant from the origin of the fire: *Atchison, T. & S. F. Rd. Co.* v. *Stanford*, 12 Kan. 354.

In the case of *Atchison, T. & S. F. Rd. Co.* v. *Bales*, 16 Kan. 252, it was held: "Where fire, which is negligently permitted to escape from an engine of a railroad company, does not fall upon the plaintiff's property, but falls upon the property of another, setting it on fire, and then spreads by means of dry grass, stubble, and other combustible materials, and passes over the land of several different persons before it reaches the property of the plaintiff, and, finally reaching the property of the plaintiff at a great distance from where the fire was first kindled, sets it on fire and consumes it, held, that the negligence of the railroad company, in such a case, is not too remote from the injury to the plaintiff's property to constitute the basis of a cause of action against the company."

In case of *Poeppers* v. *Missouri, K. & T. Ry. Co.*, 67 Mo. 715, sparks from the locomotive set fire to the prairie where the grass was rank. The wind was high, and the fire extended three miles before night, then died down, and the next morning the wind rose, and carried the fire five miles further, where the fire destroyed plaintiff's property. The court held "that, as the rise of the wind was a thing which a prudent man might reasonably have anticipated, it could not be regarded as the intervention of a new agency, so as to relieve the company from the consequences of its negligence in permitting the fire to escape, and that the fire was in fact one conflagration, notwithstanding the lapse of time, and the great distance over which it travelled before reaching plaintiff's property." In Missouri this may be correct.

In *Delaware, L. & W. Rd. Co.* v. *Salmon*, 39 N. J. Law 300, the court held: "Where one, by negligence or misconduct, occasions a fire on his own premises, or the premises of a third person, which spreads from thence to the plaintiff's property, and causes an injury, the injury is not, as a legal proposition, too far removed

from his negligent act to involve him in legal liability." And 35 N. Y. and 62 Penn. St., *supra*, are disapproved.

The case of *Kellogg* v. *Chicago & N. W. Ry. Co.*, 26 Wis. 223, was fully considered, and the court held: "The maxim, *causa proxima non remota spectatur*, is not controlled by time or distance, nor by the succession of events. An efficient adequate cause being found, must be deemed the true cause, unless some other cause, not incidental to it, but independent of it, is shown to have intervened between it and the result. The maxim includes liability for all actual injuries which are the natural and probable result of the wrongful act or omission complained of, or were *likely* to ensue from it under ordinary circumstances." And 35 N. Y. and 62 Penn. St., *supra*, are disapproved.

In case of *Fent* v. *Toledo P. & W. Ry. Co.*, 59 Ill. 349, the opinion, delivered by Chief Justice LAWRENCE, disapproves of 35 N. Y., and 62 Penn. St., *supra*, and deals at length with remote and proximate causes. The court there hold: "If fire is communicated from a railway locomotive to the house of B., it is not a conclusion of law that the fire sent forth by the locomotive is to be regarded as the remote and not the proximate cause of the injury to B., but that is a question of fact, to be determined in each case by the jury, under the instructions of the court. If loss has been caused by the act, and it was, under the circumstances, a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause, whether the house burned was the first or the tenth, the latter being so situated that its destruction is a consequence reasonably to be anticipated from setting the first on fire. If, on the other hand, the fire has spread, beyond its natural limits by means of a new agency—if, for example, after its ignition a high wind should arise, and carry burning brands to a great distance, by which a fire is caused in a place that would have been safe but for the wind—such a loss might fairly be set down as a remote consequence, for which the railway company should not be held responsible."

In *Milwaukee & St. P. Ry. Co.* v. *Kellogg*, 94 U. S. 469, the claim was that fire was negligently communicated from a steamboat of the company, by sparks from the chimney, to an elevator of the company, built of pine lumber, and 120 feet high, and standing on the bank of the river, and from the elevator to a saw-mill and lumber piles of Kellogg. The mill was 538 feet distant from the ele-

vator, and the nearest pile of lumber was 388 feet distant from it. When the steamboat went alongside the elevator, an unusually strong wind was blowing from the elevator towards the mill and lumber. The case was from Iowa. The court held: "The question as to what is the proximate cause of an injury is ordinarily not one of science or of legal knowledge, but of fact for the jury to determine, in view of the accompanying circumstances." "A finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, is not warranted unless it appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." "Where there is no immediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it."

In the case of *Hoyt* v. *Jeffers*, 30 Mich. 181, more than one building was burned by fire communicated by sparks from a mill chimney. As to the second building the court held: "even where such second building is at such a distance from the first, that its taking fire from the first might not, *a priori*, seem possible, yet if it be satisfactorily shown that it did, in fact, thus take fire without any negligence of the owner, or any fault on the part of any third party, which could be properly recognised as the proximate cause, and for which he could be held liable, the party through whose negligence the first building was burned, cannot, on principle, be held exempt from equal liability for the burning of the second."

These numerous citations show many phrases of this subject, and that each case must be determined by its peculiar facts, and so is largely within the province of the jury.

Here explosives are averred to have been in Crawford's house, but if they ever exploded it is not averred that any injury came from such explosion. There is shown no new cause operating after the fire was carried from the chimney of the mill on its destructive mission. The demurrer was rightly sustained, and the court did not err in affirming the judgment, and the judgment is affirmed.

The general rule of the common law respecting liability for injuries caused by fire is well stated in the case of *Hewey* v. *Nourse*, 54 Me. 258, by DICKERSON, J.: "Every person has a right to kindle fire on his own land for the purposes of husbandry, if he does it at a proper time, and in a suitable manner, and uses reasonable care and diligence to prevent its spreading and doing injury to the property of others. The time may be suitable and the manner prudent, and yet, if he is guilty of negligence in taking care of it, and it spreads and injures the

property of another in consequence of such negligence, he is liable in damages for the injury done. The gist of the action is negligence, and if that exists in either of these particulars, and injury is done in consequence thereof, the liability attaches; and it is immaterial whether the proof establishes gross negligence or only a want of ordinary care on the part of the defendant." See, generally, Cooley on Torts 590, and cases cited.

Where the use of steam machinery is lawful, the same principles apply. If fires are kindled by sparks or otherwise in the use of it, no action lies unless negligence appears: Cooley on Torts 591, and cases cited.

Such being the general principles involved in the principal case, we come now to the main point of that case, the extent of the liability where a fire negligently caused has spread to a house adjoining the one first set on fire by the negligence of the defendant.

In the cases of *Ryan* v. *N. Y. Cent. Rd.*, 35 N. Y. 210, and *Penna. Rd.* v. *Kerr*, 62 Penn. St. 353, it was held that, while the party guilty of the negligence would be liable to the owner of the adjoining house to which the fire spread, his liability does not extend further, and that he was not liable to the owner of another house to which the fire had spread from the burning of the first.

These cases are sufficiently criticised by the court in the principal case, and require no further notice. They seem to be founded more upon the vicious principle of expediency than upon sound reason, and, so far as we can see, have no valid support in reason or authority. The clear weight of authority is opposed to them, and they do not seem to be entirely satisfactory, even in the states where they were respectively decided. See *Webb* v. *Rome, &c., Rd.*, 49 N. Y. 427; *Pollett* v. *Long*, 56 Id. 206: *Oil Creek, &c., Rd.* v. *Keighron*, 74 Penn. St. 316; *Penna. Rd.* v. *Hope*, 80 Id. 373. The contrary doctrine is so well stated by Judge Cooley, in his work on Torts (p. 77), that we cannot do better than use his language: "The negligent fire is regarded as a unity; it reaches the last building as a direct and proximate result of the original negligence, just as a rolling stone put in motion down a hill, injuring several persons in succession, inflicts the last injury as a proximate result of the original force as directly as it does the first; though, if it had been stopped on the way and started anew by another person, a new cause would thus have intervened, back of which any subsequent injury could not have been traced. Proximity of cause has no necessary connection with contiguity of space or nearness in time. The slow match, which causes an explosion after much time and at a considerable distance from the ignition, and the libellous letter which is carried from place to place by different hands before publication, produce an injurious result which is as proximate to the cause and as direct a sequence as if, in the one case, the explosion had been instantaneous, and in the other, the author had called his neighbors together and read to them the libel." Citing *Smith* v. *London, &c., Rd.*, L. R., 5 C. P. 98; *Perley* v. *Eastern Rd.*, 98 Mass. 414; *Clemens* v. *Hannibal, &c., Rd.*, 53 Mo. 366; *Hoyt* v. *Jeffers*, 30 Mich. 181; *Fent* v. *Toledo, &c., Rd.*, 59 Ill. 349; *Toledo, &c., Rd.* v. *Muthersbaugh*, 71 Id. 572; *Annapolis, &c., Rd.* v. *Gantt*, 39 Md. 115; *Baltimore, &c., Rd.* v. *Reaney*, 42 Id. 117; *Kellogg* v. *Chicago, &c., Rd.*, 26 Wis. 223: *Hooksett* v. *Concord, &c., Rd.*, 38 N. H. 242; *Atchison, &c., Rd.*, v. *Stanford*, 12 Kan. 354; *Kellogg* v. *St. Paul, &c., Rd.*, 94 U. S. 469; *Delaware, &c., Rd.* v. *Salmon*, 39 N. J. 299. The same principle was also ruled, or assumed as settled, in the following cases: *Atchison, &c., Rd.* v. *Boles*, 16 Kan. 252; *Poeppins* v. *Missouri, &c., Ry.*, 67 Mo. 715; *Small* v. *Chicago, &c., Rd.*, 50 Ia. 338; *Toledo, &c., Ry.* v.

Pindar, 53 Ill. 447; *Ins. Co.* v. *Tweed*, 7 Wall. 44; *Ingersoll* v. *Stockbridge, &c., Rd.*, 8 Allen 438. See, also, *Lehigh Valley Rd.* v. *McKeen*, 90 Penn. St. 122. See, however, *The Pennsylvania Co.* v. *Whitlock*, 99 Ind. 16, 26; *Hoag* v. *Lake Shore, &c., Rd.*, 18 Am. L. Reg. (N. S.) 214, and note.

Upon the whole, the principal case seems to have been decided in accordance with both principle and the clear weight of authority.

M. D. EWELL.

Chicago.

Supreme Court of Indiana.

TYLER v. ANDERSON.

Where land is sold at a fixed price per acre, and the vendor fraudulently misrepresents the number of acres, the vendee is entitled to an abatement in the purchase price, although the deed contains, after specifying the number of acres, the phrase "more or less."

An answer of failure of consideration must set out the facts showing the failure; and error in sustaining a demurrer to such an answer is not rendered harmless merely because a general plea of want of consideration is left standing.

APPEAL from Warren Circuit Court.

C. V. McAdams and *Wm. P. Rhodes*, for appellant.

W. L. Rabourn, for appellee.

The opinion of the court was delivered by

ZOLLARS, J.—Suit upon a promissory note executed in 1882. The court below sustained a demurrer to the first paragraph of appellant's answer. That ruling is the only question presented for review here. The substantial averments of that answer may be epitomized as follows: In 1874, appellant purchased of Ruth V. Anderson two tracts of land, and received from her two warranty deeds therefor, copies of which are made a part of the answer. In one of them the consideration is stated as the sum of $10,800, and the land is described as the N. E. ¼, and E. ½ N. W. ¼, section 24, township 21 N., range 10 W., containing 240 acres more or less. In the other the consideration is stated as the sum of $3200, and the land is described as the E. ½ S. W. ¼, section 13, township 21 N., range 10 W., containing 80 acres, more or less. The contract of sale entered into by appellant and Ruth V. Anderson was that appellant should pay for the 240 acres at the sum of $45 per acre, and for the other tract of 80 acres at the sum of $40 per acre, the sale and purchase being by the acre, and not for a gross sum.